35229-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VYACHESLAV KOSTENYUK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant alleges his trial counsel provided ineffective assistance of counsel for failing to raise and argue that the original *Terry* stop of the defendant was without reasonable suspicion. However, this argument is being raised for the first time on appeal and the facts necessary to adjudicate this claim are not in the record on appeal; therefore, no actual prejudice can be shown and the error is not manifest.

Notwithstanding, there was sufficient basis to detain the defendant on the available facts and reasonable inferences that can be drawn from those facts.

II. ISSUES PRESENTED

Can a defendant establish actual prejudice for an ineffective assistance of counsel claim when he raises an argument for the first time on appeal, and the facts necessary to determine the issue are not in the record on appeal?

III. STATEMENT OF THE CASE

Because a suppression motion was not brought challenging the legality of the defendant's temporary detention pursuant to *Terry v. Ohio,*[1] the details necessary to adjudicate the precise circumstances surrounding

[1] 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889 (1968).

the stop were never at issue or in need of resolution for the trial. However, there are some facts and a probable cause affidavit that are marginally helpful in establishing the legality of the defendant's detention. The defendant was seen sprinting full speed from an open, residential attached garage, with items concealed under his shirt, toward a car parked not in front of the residence, but parked one-half block down the street from the residence he was fleeing from. RP 40-41; CP 3-4. This sprinting from the garage occurred just before noon, on August 20, 2015. CP 3. The door to the garage from which he sprinted remained open as he drove away from the residence, as did the passenger door and rear hatch-back door to the vehicle situated in the garage. CP 3.

IV. ARGUMENT

MR. VYACHESLAV FAILS TO ESTABLISH THE ACTUAL PREJUDICE PRONG OF HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE HE RAISES THIS ARGUMENT FOR THE FIRST TIME ON APPEAL, AND THE FACTS NECESSARY TO DETERMINE THE ISSUE ARE NOT IN THE RECORD ON APPEAL.

No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731,

113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

Additionally, a party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5; *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); *State v. Torres*, 198 Wn. App. 864, 875, 397 P.3d 900, *review denied*, __ Wn.2d __, 404 P.3d (2017). The requirement that arguments be first asserted at trial is principled. This prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012); *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006). The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no

opportunity to address. *Strine*, 176 Wn.2d at 749-50 (2013); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Here, Mr. Vyacheslav alleges his attorney provided ineffective assistance of counsel because he failed to file a motion requesting suppression of the evidence gathered as a result of his restraint, the items he purloined from the vehicle that was housed in a residential attached garage. However, because this Fourth Amendment issue was not raised in the lower court, the issue is not reviewable on direct appeal. [2]

Where, as here, there was no motion to suppress, the facts necessary to address the underlying suppression claim are not in the record on appeal and, in this case, prevent the defendant from establishing prejudice – the necessary second prong of an ineffective assistance of counsel argument. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest); *Torres*, 198 Wn. App. at 875 (defendant forfeited appellate review of claim raised for first time on appeal that she was seized in violation of Fourth Amendment because the facts necessary to adjudicate the claimed error

[2] The issue may be reviewable by personal restraint petition.

were not in the record on appeal) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Had the defendant moved for suppression, the State would have supplied facts in response to the motion. For instance, the State may have established there were no other cars parked on the residential streets in that precise area during the middle of a working day[3] in an area where all of the houses had driveways,[4] and the City code prevented general parking on the street for longer than twenty-four hours.[5] These currently unproduced "facts" would support a basis for the stop because it is unusual for a person to park a half-block away from their own residence or a residence they were visiting when they could have parked in the driveway, or in the garage, or directly in front of the residence. When these additional facts are considered in conjunction with the defendant's mad dash away from an open attached

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[3] August 20, 2015, was a Thursday, and the theft occurred in a South Hill neighborhood.

[4] If one were to look at the driveway of this residence, 1818 E. Pinecrest, and the surrounding residences on Google, it may well appear that all of the houses have driveways and garages.

[5] Spokane Municipal Code, Section 16A.61.561 Parking Time Limited and Regulated

> A. No vehicles shall be parked continuously on any one block face upon any public street or highway in this City at any time for a period longer than twenty-four hours. Vehicles in violation may be deemed unauthorized and subject to twenty-four hour notification of impoundment and be impounded.

garage, leaving the garage and perhaps the house open and unprotected, and leaving the vehicle within the garage open and unprotected, while concealing or carrying concealed items underneath his shirt, the totality of the circumstances are more than enough to establish the reasonableness of the suspicion necessary for a *Terry* stop. Police violate neither the Fourth Amendment nor article 1, section 7 by conducting a brief "*Terry*" investigatory stop if they have "a reasonable and articulable suspicion that the individual [stopped] is involved in criminal activity." *State v. Walker*, 66 Wn. App. 622, 626, 834 P.2d 41 (1992).

These circumstances, and many more that could be established if a suppression hearing were held, support a reasonable suspicion that a theft had occurred, and the defendant was involved in the theft. "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).[6] Additionally, "[a] determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*,

[6] Compare *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426, (2008) (court notes that flight from police officers may be considered along with other factors in determining whether officers had a reasonable suspicion of criminal activity, citing *State v. Little*, 116 Wn.2d 488, 496, 806 P.2d 749 (1991), but noted that Mr. Gatewood did not flee from the police).

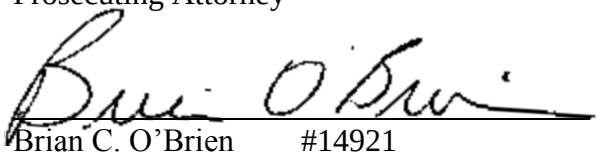
534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). "In allowing [investigative] detentions, *Terry* accepts the risk that officers may stop innocent people." *Wardlow*, 528 U.S. at 126. Indeed, simply running away from an open garage with items concealed under a shirt to a car parked a half-block away, and subsequently driving away from the area, in itself, establish reasonable suspicion for the stop. Mr. Vyacheslav has failed to establish manifest error from the record in this case. Therefore, the judgment and sentence should be affirmed.

V. CONCLUSION

The defendant fails to establish manifest error in the instant case. The State respectfully requests the court affirm the judgment and sentence.

Dated this 7 day of December, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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I certify under penalty of perjury under the laws of the State of Washington, that on December 7, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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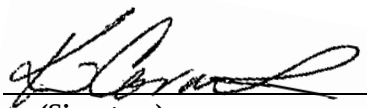
12/7/2017 (Date) Spokane, WA (Place)  (Signature)

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